Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1415

RAY ANTHONY HALL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

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To the United States Court of Appeals
For the Fifth Circuit

Ray Anthony Hall, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case January 2, 1979. A petition for rehearing and petitions for rehearing en banc were denied February 15, 1979.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered January 2, 1979. Petition for rehearing and petition for rehearing en banc were denied February 15, 1979. This application is being filed within thirty (30) days from the date of denial of the petition for rehearing. [United States v. Healy, 376 U.S. 75, 11 L.Ed. 2d 527, 84 S.Ct. 553].

Jurisdiction to issue the writ is invoked pursuant to the provisions of Title 28, Section 1254(1), United States Code.

Petitioner, along with Johnny Edmond and Jeffrey G. Dyar, was convicted in the United States District Court for the Northern District of Georgia on a one count indictment charging violation of Title 18, Sections 2 and 1201, United States Code.

QUESTIONS PRESENTED

1. Whether the principle of "harmless constitutional error", as limited by this Honorable Court's decision in *Chapman v. California* (1967), 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705, was properly applied in affirming petitioner's conviction of kidnapping?

2. Whether the decision of the Fifth Circuit Court of Appeals, review of which is sought herein, is in conflict with its decisions in *Blackburn v. Cross* (1975), 5 Cir., 510 F.2d 1014, and *Vaccaro v. United States* (1972), 5 Cir., 461 F.2d 626, in that "other overwhelming evidence of guilt" has been equated with "beyond a reasonable doubt" as a test for determining "harmless constitutional error"?

3. Whether evidence of crimes other than that charged against a defendant on trial may be lawfully received in evidence for the purpose of explaining conduct of a prosecutive witness?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States provides [*Constitution of United States, Article IV*]:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 18, Section 2, United States Code, provides:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal.

As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

Title 18, Section 1201, United States Code provides:

§ 1201. Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101 (32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 (32)); or

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title,

shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a) (1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5

and 7 of this title and section 101(34) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(34)).

(f) In the course of enforcement of subsection (a) (4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a) (4), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

As amended Oct. 24, 1972, Pub.L. 92-539, Title II, § 201, 86 Stat. 1072; Oct. 8, 1976, Pub.L. 94-467, § 4, 90 Stat. 1998.

STATEMENT OF THE CASE

The evidence is well summarized in the Fifth Circuit Court of Appeals decision. [Appendix A]. Same is, however, set forth here in some detail for ready reference.

On Sunday, April 11, 1976 at approximately 7:30 P.M., William Court Katker, III, ["Court" throughout the proceedings], wearing a tennis outfit, left his apartment in Miami Lakes, Florida, to find his little brother and bring him home to dinner.

A blue two-door Cadillac, occupied by Johnny Edmond, Ray Anthony Hall, and Jeffrey G. Dyar, was in the parking lot in front of his apartment. After discussion concerning knowledge of certain individuals and "yellow pages" of the Miami telephone directory, Court was pushed into the back seat of the Cadillac, asked by the occupants to show them the way to Interstate Highway 95 North, which he did, and the Cadillac was driven to Atlanta, Georgia via the Florida Turnpike.

While in route Court was told a man named Omar had ripped them off for $13,250 with which they intended to purchase fifty pounds of marijuana and he was going to be used as an "insurance policy".

The Cadillac was stopped twice for gasoline between Miami and Atlanta and Court made no attempt to escape or seek help.

At approximately 6:30 A.M. April 12, 1976 the Cadillac arrived at Petitioner's residence in Atlanta, Georgia, 2900 Aurie Court. There was discussion and the parties left the house and proceeded to a public telephone booth from which Court made a telephone call to a brother in Miami asking him to find Omar and have him send $14,000 to Johnny Edmond.

Returning to Petitioner's residence Court took a shower and was given a white leisure suit to wear. Court then went with Petitioner and Dyar to make another telephone call to Court's brother. This call was made about 11:00 A.M. and the sending of money was urged. Meanwhile Dyar informed Court that a Barry Yanks had called stating he was going to inform the Federal Bureau of Investigation of the situation.

Court, Dyar and Petitioner then went to the apartment of one of Petitioner's friends where they drank beer and watched television until about 1:30 P.M., when they ran some errands, went to a barber shop, a grocery store where Court had a coca cola, and then to a pool room, after which the entire group returned to Petitioner's residence where Court took a nap. Court was awakened and told they were going to make another telephone call. While they were about to use the telephone at a convenience store agents of the Federal Bureau of Investigation placed then under arrest.

At this time Court was still in Petitioner's automobile, and the FBI agent who removed him from the car could not recall whether he stated he had been abducted. However, at no time did he attempt to get away from the group and admitted he was in sympathy with them because they had been "ripped off" by Omar, and that he was willing to help them get their money back so that he could go home.

Persons who witnessed the group during the interval when they were drinking beer, playing pool, and at the barber shop expressed the opinion Court was not being held against his will.

Approximately fifteen minutes after the arrest and Court had been released, a group of FBI agents arrived at Petitioner's residence. Two went to the back of the house, one to the side, and others to the front. One of the agents either knocked on the door or rang the bell and announced "This is the FBI—open the door." Mrs. Kathy Hall, wife of petitioner, opened the door.

Four agents entered the residence. Two went with petitioner's wife into the kitchen, and the other two made a sweep search of the house during which they saw a telephone recorder, known as a Code-a-phone, in one of the bedrooms. Petitioner's wife was informed he and his companions had been arrested and Court released. A *Miranda* type warning was given and her written consent to a search of the residence obtained. The Code-a-phone was seized, together with thirteen rounds of 30 caliber ammunition and an empty Magazine for an M-16 rifle.

After an indictment was returned, Petitioner filed a Motion to Suppress all of the items taken from his residence on the ground they were seized as the result of an illegal search. The District Court denied the motion and the items were introduced in evidence.

During the trial Court was permitted to testify to a statement allegedly made by Jeffrey G. Dyar, viz.

> "He was talking about what would have happened to Omar, because he said they went down, and they busted into his house, and they had two machine guns. And anybody that was there would have been killed."

The Fifth Circuit Court of Appeals held such evidence was admissible "to show Court's motive in not attempting to escape when there were apparent opportunities to do so."

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit Court of Appeals by its decision in the instant case has misapplied the principle of "harmless constitutional error" as set out in *Chapman v. California* (1967), 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705.

2. The decision of the Fifth Circuit Court of Appeals in the instant case is in direct conflict with its two earlier decisions of *Blackburn v. Cross* (1975), 5 Cir., 510 F.2d 1014, and *Vaccaro v. United States* (1972), 5 Cir., 461 F.2d 626, by equating "other overwhelming evidence of guilt" with "beyond a reasonable doubt" as a test for determining when denial of a fundamental constitutional right will be judicially determined "harmless."

3. The Fifth Circuit Court of Appeals has engrafted a new exception on the well established "evidence of other crimes" exclusionary rule, which is in conflict with the Federal Rules of Evidence and its own en banc decision in *United States v. Beechum*, 5 Cir., 582 F.2d 898.

1

Misapplication of Chapman

The Fifth Circuit decision in the instant case represents a clear misapplication of this Honorable Court's holding in *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705. After tacitly recognizing Petitioner had been denied a fundamental constitutional right by the warrantless sweep search of his residence in his absence, resting only on the slender reed of an alleged consent coerced from his wife by FBI agents with the assistance of her mother-in-law the Court determined such denial to have been of no moment because of "other overwhelming evidence" of guilt.

Thereby the Fifth Circuit sidestepped the admonitions of *Chapman*, supra, to determine

> "Whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

Inherent in this approach is the philosophy that despite denial of fundamental constitutional rights, and reasonable possibility that evidence obtained thereof may have contributed to a criminal conviction, same will be considered "harmless" since "other overwhelming evidence of guilt" existed.

2

Conflict With Its Earlier Decisions

By its decision here the Fifth Circuit Court of Appeals has reached a result contrary to its earlier holdings in *Blackburn v. Cross* (1975), 5 Cir., 510 F.2d 1014, and *Vaccaro v. United States*, 5 Cir., 461 F.2d 626, both of which adhered to the guidelines set by this Honorable Court in *Chapman v. California*, supra.

From *Blackburn v. Cross*, supra, which cited *Vaccaro*, supra, in collating, we quote (p. 1019):

> "Recent Supreme Court decisions regarding *'harmless constitutional error'* inquire as to *'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction'*: [Cit.] Only if the court can declare with confidence *'beyond a reasonable doubt'* that such a possibility in excluded by the record can it declare a constitutional error harmless. [Cits.]." [Emphasis supplied].

The Court further noted "the evidence against Blackburn was quite convincing."

The strongly worded dissent of Mr. Judge Godbold in the instant case demonstrates the other evidence "was not overwhelming" and the existence of "reasonable possibility" the illegally seized evidence might have contributed to the jury's verdict. Noting that "Court's overall conduct, including that after the state line was crossed, is considered as circumstantial evidence of whether there was [1] ever a kidnapping at all or [2] whether there was an extortion scheme in which Court was a participant, the case becomes very close" [bracketed numbers supplied]. A majority of the panel deciding the case not being persuaded by their learned colleague, and having by denial of petition for rehearing chosen to ignore the earlier decisions in *Blackburn* and *Vaccaro*, and rehearing en banc not having been granted, calls for review and correction by this Honorable Court. Otherwise, the concept of "harmless constitutional error" will be applied by the Fifth Circuit Court of Appeals, as here, only in a selective way. Uniform and consistent application of the principle can be assured by this Honorable Court's review.

3

Exception Engrafted on Evidence of Other Crimes Rule

In *United States v. Beechum*, 5 Cir., 582 F.2d 898, the Fifth Circuit Court of Appeals en banc established a "two-step test" for admission of evidence of other crimes. We quote (p.911):

> "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403."

By its decision here the Fifth Circuit Court of Appeals has approved admission of such evidence

> ". . . to show Court's motive in not attempting to escape when there were apparent opportunities to do so."

Thereby another exception has been engrafted on the rule. The only relevant motive in a criminal investigation is that of the defendant on trial—not an alleged victim or prosecutorial witness.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States of America,
Plaintiff-Appellee,

v.

Ray Anthony Hall, Johnny Edmond, and Jeffrey G. Dyar,
Defendants-Appellants.

No. 76-3634

United States Court of Appeals, Fifth Circuit

January 2, 1979

Defendants were convicted in the United States District Court for the Northern District of Georgia at Atlanta, Charles A. Moye, Jr., J., of kidnapping. Defendants appealed. The Court of Appeals, Jones, Circuit Judge, held that: (1) certain testimony as to an extrajudicial statement was properly admitted as an explanation of why the asserted victim, who had no identification and little clothing, did not attempt to escape when there were apparent opportunities to do so; (2) where the asserted victim was taken in an automobile from Florida to Georgia as "insurance" for the obtaining of money and was later held for payment of ransom by his family, the crime of kidnapping was committed, and if the asserted victim thereafter with or without justifiable excuse acquiesced in his detention and cooperated with his abductors, such conduct did not absolve them from their criminal conduct, and (3) validity of a consent search of a residence was questionable, but if the motion to suppress was erroneously denied and if fruits of warrantless search were erroneously admitted, such errors were

harmless in view of other overwhelming evidence establishing guilt of kidnapping beyond any doubt.

Affirmed.

Godbold, Circuit Judge, dissented and filed opinion.

1. **Criminal Law** Key 370, 371(1)

Evidence of other crimes, even though prejudicial, is admissible to show intent, design and knowledge.

2. **Kidnapping** Key 5

In kidnapping prosecution, wherein defendants claimed that asserted kidnapping victim was willing participant in enterprise and hence it was not kidnapping, and wherein asserted kidnapping victim testified that "[H]e said that they went down, and they busted into his house, and they had two machine guns. And anybody that was there would have been killed," such testimony was properly admitted as explanation of why asserted victim, who had no money, no identification and little clothing did not attempt to escape when there were apparent opportunities to do so. 18 U.S.C.A. § 1201.

3. **Kidnapping** Key 1

Where asserted kidnapping victim was taken in automobile from Florida to Georgia as "insurance" for obtaining of money and was later held for payment of ransom by his family, crime of kidnapping was committed, and if such asserted victim thereafter with or without justifiable excuse acquiesced in his detention and cooperated with his abductors, such conduct did not absolve them from their criminal conduct. 18 U.S.C.A. § 1201.

4. **Criminal Law** Key 394.5(2)

Searches and Seizures Key 7(26)

Particular defendant could challenge constitutionality of search of his residence and admission in evidence of fruits of the search, but other defendants had no standing to raise the question. U.S.C.A.Const. Amend. 4.

5. **Searches and Seizures** Key 3.3(1)

Quick and cursory check of residence when officers have reasonable grounds to believe that there are other persons present, inside residence, who might present security risks, is allowed only when necessity requires it. U.S.C.A.Const. Amend. 4.

6. **Criminal Law** Key 1169.1(8)

Validity of consent search of residence was questionable, but if motion to suppress was erroneously denied and if fruits of warrantless search were erroneously admitted, such errors were harmless in view of other overwhelming evidence establishing guilt of kidnapping beyond any doubt. 18 U.S.C.A. § 1201; U.S.C.A.Const. Amend. 4

Appeals from the United States District Court for the Northern District of Georgia

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Before JONES, GODBOLD and GEE, Circuit Judges.

JONES, Circuit Judge:

The appellants were charged and convicted of kidnapping in violation of 18 U.S.C.A. § 1201.[1] On Sunday, April 11,

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[1] (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or

1976 at approximately 7:30 P.M., William Court Katker, III, (herein called Court) age twenty, left his apartment in Miami Lakes, Florida to bring his little brother, John home for dinner. At this time, Court was wearing his tennis outfit. While on his way to find his brother, Court saw a blue two-door Cadillac in the parking lot in front of his apartment. The occupants of this car were appellants Johnny Edmond, Ray Anthony Hall and Jeffrey G. Dyar. The passengers in the car asked Court if he knew Barry Yanks, Jimmy Morton and Vance Katker. The passengers in the car then asked Court if he had the Miami "yellow pages" and Court replied that he did. He returned to his apartment to obtain the yellow pages. He found the yellow pages and went back to the parking lot. While trying to locate, in the yellow pages, the name of the liquor store where Barry Yanks worked, Court was pushed into the back seat of the car. After Court was in the car, the appellants asked Court to show them the way to Interstate Highway 95 North. The appellants told Court not to worry about anything. The car was

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otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(32)); or

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title,

Shall be punishable by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to the effect the ob-

driven to the Florida Turnpike and then to Atlanta, Georgia. While in the car, Court was told that a man named Omar had "ripped-off" the appellants for approximately $13,250 which they intended to use for the purchase of fifty pounds of marijuana and that the appellants were going to use Court as an "insurance policy." En route to Atlanta Hall was driving the car, Dyar was seated in the right front seat, Court was seated behind Dyar and Edmond was seated behind the driver. During this trip to Atlanta, the car stopped for gasoline twice and Court made no attempt to escape or seek help.

At approximately 6:30 A.M. on April 12, 1976, the car arrived at appellant Hall's house in Atlanta. Once inside the house, the appellants discussed getting money from Omar. After this discussion, the appellants and Court left the house to make a telephone call from a public booth. Court called his brother Vance in Florida to urge obtaining money. Court told his brother that he was being held, and that he did not know where he was or the identity of his captors. Court asked his brother to find Omar and get him to send $14,000 to Johnny Edmond.

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ject of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(34) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(34)).

(f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding. 18 U.S.C.A. § 1201.

After this call, the appellants and Court returned to the Hall residence. At this time, Court took a shower and was given a white leisure suit to wear. Dyar then told Court that Barry Yanks had called and that Yanks was going to inform the Federal Bureau of Investigation of the situation. Court then went with Hall and Dyar to make another telephone call to Court's brother who was then at Barry Yanks' apartment. This telephone call was made at approximately 11:00 A.M.; its purpose was to urge the sending of money.

Court, Hall and Dyar then went in the car to the apartment of one of Hall's friends, where the group drank some beer and watched television. Court, Hall and Dyar remained at the apartment until about 1:30 P.M. They then ran some errands, went to a barber shop and a grocery store where Court had a coca-cola. Court and Dyar went to a pool hall where they were joined by Hall and Edmond. After a while, the four returned to the Hall residence.

After Vance had received the second telephone call from Court, he had notified his father of Court's situation and the father had called the Federal Bureau of Investigation. During the afternoon Vance received another call from an unknown person who stated that the money had to be in Atlanta by 5:00 P.M. that day. Finally, Vance received a third call in the course of which he reported that he had half of the amount demanded and the caller told him that such amount should be sent to Atlanta on a 7:00 P.M. flight. Court's mother had undertaken to raise the $14,000 which she understood had been demanded from the family. Vance had never told his mother of the original demand that the money was to be obtained from Omar.

After Court's return to the Hall residence, he took a nap. He was awakened by the appellants and told that they were going to make another telephone call. When they were about to use a telephone at a convenience store, agents of the Fed-

eral Bureau of Investigation placed them under arrest. Court was still in Hall's automobile when the arrest was made. At the trial the agent who removed Court from the car could not recall whether Court stated that he had not been abducted. At no time did Court ever try to get away from the appellants. Court testified that he did not have any money or any identification and that he was wearing his tennis clothes. He admitted that he was in sympathy with the appellants because they had been "ripped off" by Omar; and that he was willing to help the appellants get their money back so that he could go home.

The appellant Hall produced evidence from Benjamin F. Robinson, Jr. that on April 12, 1976, Hall and Dyar had come to his house with Court about eleven o'clock one morning. Robinson stated that they were all drinking beer and a little whiskey and smoked a little pot. In Robinson's opinion Court was not being held against his will. Annie Mae Davenport testified that she had visited the Robinson house while Hall, Dyar and Court were present and it did not appear to her that Court was being held against his will. She testified that all present in the Robinson house were drinking. Another witness, Samuel Gardner, testified that Hall had come to his barber shop and that he noticed Court and Dyar standing outside his shop on a busy street in Atlanta. Deborah Whittaroe testified that she had seen the appellants and Court in a pool room on April 12, 1976. She stated that all of them had been playing pool together.

Such are the facts as given to the court by the appellants in their brief for the period prior to the search of the Hall dwelling.

A quarter hour, more or less, after the appellants had been arrested and their victim released, a group of FBI agents arrived at the Hall residence. Two went to the back of the house, one to the side and the others to the front door. There one of

the agents knocked on the door or rang a door bell and announced, "This is the FBI—open the door". There were two doors at the front of the house. One was a metal "burglar" door and the other was a conventional wooden door. Mrs. Kathy Hall, wife of the appellant Hall, opened the inner door. She said "Wait a minute" and went back into the house. The agent, although remembering so much in such minute detail, could not recall whether Mrs. Hall went to attend her child or to attire herself in more or different clothing. She soon returned and opened the outer door.

Four agents entered the house. Two went with Mrs. Hall into the kitchen. The other two made a sweep search of the house. During the sweep search an agent saw a telephone recorder, known as a Code-a-phone, in one of the bedrooms. No other persons were in the house. An agent talked with Mrs. Hall in the kitchen. The agent testified that Mrs. Hall was told that her husband and his two companions had been arrested and the kidnap victim released. The interrogating agent was informed that the Code-a-phone had been seen during the sweep search. She was given a *Miranda* warning and somewhat more than a black-letter text of the law of search and seizure. Her consent to a search was requested. She was told, among other things, that if she did not consent a search warrant would be procured. Mrs. Hall's mother-in-law, the mother of the appellant Hall, arrived at the house and the situation was discussed by the two women. After this conversation Mrs. Hall agreed to consent. The agent wrote out a consent for her signature. It was signed and a search was made. In addition to the Code-a-phone, the searchers found and took thirteen rounds of 30 calibre ammunition, and an empty magazine for an M-16 rifle.

After the appellants were indicted, Hall filed a motion to suppress all of the items taken from his residence on the ground that they were unlawfully seized as a result of an illegal search. After a hearing on the motion it was overruled. In the off-the-cuff statements of the district court it was said that "it seems

clear that the consent was given upon the advice of the mother-in-law" and that "the court would think that very possibly such a search could be sustained even in the absence of a search warrant or the absence of consent". It is not necessary that this Court consider giving its sanction to these observations.

[1, 2] During the trial Court was questioned by Government counsel regarding a conversation with the appellant Dyar regarding the efforts of the appellants to obtain money from the somewhat shadowy Omar. In response to a prosecutor's question as to Dyar's statement, Court said, "He was talking about what would have happened to Omar, because he said that they went down, and they busted into his house, and they had two machine guns. And anybody that was there would have been killed."

A verdict of guilty was returned, sentence was imposed and appeals were taken. On appeal two questions were presented, whether the statement of Dyar as to what would have happened to Omar should have been admitted in evidence and whether the motion to suppress was properly overruled.

At the trial the appellants claimed that Court was a willing participant in the enterprise and hence there was no kidnapping. The district court admitted the evidence as to what might have happened if Omar's dwelling had been occupied as an explanation of why Court, who had no money, no identification and little clothing, did not attempt to escape. Evidence of other crimes, even though prejudicial, is admissible to show intent, design and knowledge. *United States v. Jackson*, 5th Cir. 1976, 536 F.2d 628; *Bruinsma v. United States*, 5th Cir. 1968, 402 F.2d 261. The evidence here was admissible to show Court's motive in not attempting to escape when there were apparent opportunities to do.

[3] Court was taken in an automobile from Miami Lakes, Florida, to Atlanta, Georgia, as "insurance" for the obtaining

of money from Omar. He was later held for the payment of ransom by his family. When the car, occupied by the twenty year old Court and the three appellants, crossed the Georgia-Florida line, there had been the interstate transportation of an unassenting person who was held for ransom or reward, the crime of kidnapping had been committed. 18 U.S.C.A. § 1201; *United States v. McBryar*, 5th Cir. 1977, 553 F.2d 433; *Hattaway v. United States*, 5th Cir. 1968, 399 F.2d 431. If Court thereafter with or without justifiable excuse, acquiesced in his detention and cooperated with his abductors such conduct would not have absolved them from their criminal conduct.

[4, 5] The search of the residence and the admission in evidence of the fruits of the search are challenged by the appellant Hall[2] as a violation of his Fourth Amendment rights.[3] The rights guaranteed by this amendment are regarded as "of the very essence of constitutional liberty". *Gouled v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921). The justification for the entry into the Hall residence and the sweep search, which disclosed the telephone recording device and the other personal property subsequently seized, was to determine whether there were any persons in the dwelling who were participants in the kidnapping. It is doubtful whether the entry and initial search in this case can be upheld under the principles stated in *United States v. Bowdach*, 5th Cir. 1977, 561 F. 2d 1160. There it is held that officers have a right to make a quick and cursory check of a residence when they have reasonable grounds to believe that there are other persons present, inside the residence who might present a security risk, and this

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[2] The other appellants have no standing to raise the question. *United States v. Gramlich*, 5th Cir. 1977, 551 F.2d 1359.

[3] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S.Const. Art. IV.

is true whether the arrest of the defendant was made inside or outside the residence. Such a search is allowed only when necessity requires it.

[6] The validity of the consent search is questionable. The district court determined that the consent was the result of the advice of Hall's mother to her daughter-in-law rather than the representations of the FBI agent to the wife of the appellant. But there can be no doubt that whatever advice was given by the elder to the younger Mrs. Hall was based upon the FBI statements passed on to the elder Mrs. Hall by her daughter-in-law. It seems quite clear that there would have been no representations made to Mrs. Hall that a warrant would be procured if consent was refused.[4] It is doubtful that the FBI agents had any information which would permit the making of an oath or affirmation such as is required by the constitutional provision. The agents knew there were no other kidnappers in the house. They knew there was a Code-a-phone but they could not say it had any recorded tapes in it.

Nevertheless, if it was error to deny the motion to suppress and error again to admit in evidence the fruits of the warrantless search, such errors were harmless in view of the other overwhelming evidence which established guilt beyond any doubt. It follows that the judgments of conviction and sentence of all of the appellants should be and are

AFFIRMED.

GODBOLD, Circuit Judge, dissenting:

To me this is a close case on the merits. The federal offense of kidnapping would be complete when the state line was crossed, and Court's subsequent acquiescence would not ab-

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[4] Mrs. Hall's testimony as to threats made by an FBI agent were not credited by the district court and are given no credence here.

solve the defendants of criminal responsibility. But when Court's overall conduct, including that after the state line was crossed, is considered as circumstantial evidence of whether there was ever a kidnapping at all or whether there was an extortion scheme in which Court was a participant, the case becomes very close. Therefore, I cannot join in the palliative of harmless error[1] which insulates the entry and search from scrutiny. The officers entering the apartment knew when they entered that a quarter of an hour more or less previously and some two miles away the three defendants already had been arrested and Court, who was with them, had been released. The entry cannot be justified as a matter of necessity. It cannot be justified upon the right of an officer who has validly entered to make a security search of the immediate surroundings. It cannot be justified on the basis of consent, because if there was valid consent at all it was secured after the sweep search had been completed and the telephone recording device already found.

I respectfully dissent.

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[1] Harmles error beyond reasonable doubt, since constitutional issues are involved, *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

October Term, 19

No. 76-3634

D. C. Docket No. CR-76-147-A

United States of America, Plaintiff-Appellee,

versus

Ray Anthony Hall, Johnny Edmond
and Jeffrey G. Dyar, Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

Before JONES, GODBOLD and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard upon the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

January 2, 1979

Godbold, Circuit Judge, dissenting.
Issued as Mandate:

APPENDIX C

In the United States Court of Appeals
For the Fifth Circuit

No. 76-3634

United States of America, Plaintiff-Appellee,

versus

Ray Anthony Hall, Johnny Edmond and Jeffrey G. Dyar, Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

(Filed February 15, 1979)

On Petitions for Rehearing and Petitions for Rehearing En Banc

Opinion 1-2-79, 5 Cir., 197.., ... F.2d ....)

Before JONES, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

The motion of Ray Anthony Hall to adopt the petition for rehearing en banc filed by Jeffrey G. Dyar is GRANTED.

The petitions for rehearing on behalf of Ray Anthony Hall and Jeffrey G. Dyar are DENIED, and no member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petitions for rehearing en banc on behalf of Jeffrey G. Dyar and Ray Anthony Hall are DENIED.

ENTERED FOR THE COURT:

/s/ JOHN C. GODBOLD
United States Circuit Judge

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